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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 995

THE STATE OF WASHINGTON,
Appellee,

v.

HI-LO FOODS, INC.,
a Washington corporation;
TACOMA ASSOCIATION OF CREDIT MEN,
a Washington corporation,
Appellant,

and

JACK FROST COMPANY, INC.,
a Washington corporation.

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

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SUBJECT INDEX

	Page
Jurisdictional Statement	1
Opinion Below	1
Jurisdiction	2
Questions Presented	4
Statement of the Case	5
The Questions Are Substantial	8
Conclusion	10

Appendices:

Appendix A	Decision of Washington State Supreme Court	App. 1
Appendix B	Statutes Involved	App. 14

TABLE OF CASES

Chicago, Rock Island & Pacific Railway Company v. Perry, 259 U.S. 548, 42 S. Ct. 524, 66 L. Ed. 1056 (1921) 2

Hillsborough v. Cromwell, 326 U.S. 620, 66 S. Ct. 425, 90 L. Ed. 358 (1946) 8

Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649, 2 A.L.R.(2d) 1338 (1948) 3

International Harvester Credit Corp. v. Goodrich, et al., 350 U.S. 537, 76 S. Ct. 621, 100 L. Ed. 681 (1956) 3

Morey v. Doud, 354 U. S. 457, 77 S. Ct. 1344, 1 L. Ed.(2d) 1485 (1957) 3, 9

Municipal Investors Assn. v. City of Birmingham, 316 U.S. 153, 62 S. Ct. 975, 86 L. Ed. 1341 (1942) 2

Quaker City Cab Co. v. Penn., 277 U. S. 389, 48 S. Ct. 553, 72 L. Ed. 927 (1928) 3, 9

Page

Raley v. Ohio, 360 U.S. 423, 79 S. Ct. 1257, 3 L. Ed. 1344, 1354 (1959) 3

Senn v. Tile Layers Protective Union, Local No. 5, 301 U.S. 468, 57 S. Ct. 857, 81 L. Ed. 1229 (1937) 2

Standard Oil Co. of California v. Johnson, 316 U.S. 481, 62 S. Ct. 1168, 86 L. Ed. 1611 (1942) 2

STATUTES

R.C.W. Chap. 82.32 3

R.C.W. 82.32.220 ..... 3, 4, 5, 6, *et seq.*

1955 Session Laws of Washington, Chap. 389, § 39 3-4

28 U.S.C. § 1257 (2) 2, 3, 10

CONSTITUTIONAL PROVISIONS

Federal Constitution, § 1, Amend. 14 5

Washington State Constitution, Article 1, § 12 5

IN THE

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THE STATE OF WASHINGTON, *Appellee*,

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

This appeal is from a final judgment of the Supreme Court of the State of Washington which reversed the judgment of the Superior Court of Pierce County and remanded the action to the Superior Court with instructions to enter judgment for appellee.

OPINION BELOW

The opinion of the Supreme Court of the State of Washington in this case is reported in 162 Wash. Dec. 525, 383 P.(2d) 910. The opinion is appended hereto, as Appendix A, and is contained in the transcript on appeal (R. 0056) together with the order denying the petition for rehearing (R. 0076).

JURISDICTION

This action was commenced by appellee as an ordinary civil action in the Superior Court of the State of Washington for Pierce County to obtain an adjudication as to the priority of two tax liens as against the antecedent lien of appellants' mortgage. The Superior Court held that appellant's lien had priority because the statute under which appellee was claiming priority is repugnant to the state constitution and Amendment 14, Section 1, of the Federal Constitution. The Supreme Court of Washington reversed the trial court's judgment with instructions to grant the appellee's lien's priority. The judgment of the Supreme Court of Washington became a final judgment of that court on November 20, 1963 (R. 0076) simultaneously with a denial of the petition for rehearing (R. 0075). Notice of this appeal was filed in Supreme Court of Washington on February 17, 1964 (R. 0077).

Appellant having challenged the state statute on the grounds of its repugnancy to the Federal Constitution, and the Supreme Court of Washington having decided that issue in favor of the validity of the statute, this court has jurisdiction to review the decision below by direct appeal, as conferred by 28 U.S.C. §1257 (2). The availability of review by appeal in this court is sustained by *Senn v. Tile Layers Protective Union, Local No. 5*, 301 U.S. 468, 57 S. Ct. 857, 81 L. Ed. 1229 (1937); *Standard Oil Co. of California v. Johnson*, 316 U.S. 481, 62 S. Ct. 1168, 86 L. Ed. 1611 (1942); *Municipal Investors Assn. v. City of Birmingham*, 316 U.S. 153, 62 S. Ct. 975, 86 L. Ed. 1341 (1942); *Chicago, Rock Island & Pacific Railway Company v. Perry*, 259 U.S. 548, 42 S. Ct. 524, 66 L. Ed. 1056 (1921). In each of the fore-

going cases, the party seeking review had challenged the constitutionality of the state statute as being repugnant to the Federal Constitution, the state court had decided that issue in favor of the validity of the state statute, and this court accepted jurisdiction on appeal, or by writ of error. The availability of review by appeal as to the requirement of presentation of the federal questions in the courts below, is further sustained by *Illinois Ex Rel. McCollum v. Board of Education*, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649, 2 A.L.R.(2d) 1338 (1948); and *Raley v. Ohio*, 360 U.S. 423, 79 S. Ct. 1257, 3 L. Ed. 1344, 1354 (1959), the latter case pertaining to a federal question raised under 28 U.S.C. §1257 (3).

Additional cases sustaining jurisdiction are: *Morey v. Doud*, 354 U.S. 457, 77 S. Ct. 1344, 1 L. Ed.(2d) 1485 (1957); *Quaker City Cab Co. v. Penn.*, 277 U.S. 389, 48 S. Ct. 553, 72 L. Ed. 927 (1928); *International Harvester Credit Corp. v. Goodrich, et al.*, 350 U.S. 537, 76 S. Ct. 621, 100 L. Ed. 681 (1956).

The validity of Revised Code of Washington (R.C.W.) §82.32.220 is involved in this appeal. The full text of that statute is set forth in Appendix B hereto. The statute is found in Volume 8 of the Revised Code of Washington, Chapter 82.32, page 13 thereof; that statute, with the proviso here in question, was originally enacted and is found in 1955 Session Laws of Washington, Chapter 389, §39 thereof. The portion of the statute which contains the proviso in question is as follows:

> "The lien shall not be superior, however, to bona fide interests of third persons which had vested prior to the filing of the warrant when such third persons do not have a beneficial interest, direct or indirect,

in the operation of the business, other than the securing of the payment of a debt or the receiving of a regular rental on equipment: *provided, however*, that the phrase 'bona fide interests of third persons' shall not include any mortgage of real or personal property or any other credit transaction that results in the mortgagee or the holder of the security acting as trustee for unsecured creditors of the taxpayer mentioned in the warrant who executed such chattel or real property mortgage or the document evidencing such credit transaction."

The proviso, the validity of which is here in question, is that portion of the statute quoted above beginning with the words "provided, however . . ."

QUESTIONS PRESENTED

The predecessors of Hi-Lo Foods, Inc., for the purpose of obtaining an extension of time to pay the claims of their existing general creditors, executed a mortgage of all their property to appellant, as trustee for those general creditors (R. 0041). The mortgage was executed on May 18, 1956. That mortgage covered a leasehold interest, specific chattels (R. 0050) and all other property of the mortgagors including their shifting stock of merchandise. In 1959, appellee filed tax warrants against Hi-Lo Foods, Inc., who had acquired the mortgaged property and assumed the mortgage. Under the express language of R.C.W. 82.32.220 (Appendix B) appellee's tax liens would be entitled to priority over appellant's mortgage lien. The Pierce County Superior Court granted priority to appellant's mortgage lien over the tax liens on the grounds that the proviso contained in R.C.W. 82.32.220 denies appellant equal protection of the laws, denies it due process of law, and grants special privileges and

immunities to others within the same class of persons as appellant (Conclusion of Law II, R. 0018). The basis of the trial court's decision was stated by the Supreme Court of the State of Washington (R. 0060) to be R.C.W. 82.32.220 repugnancy to Article 1, §12 of the Washington State Constitution and its repugnancy to §1, Amendment 14 of the Federal Constitution. The Supreme Court of Washington reversed the trial court's judgment with instructions to grant priority to appellee's tax liens, that court having upheld the validity of R.C.W. 82.32.220 under the State and Federal Constitutions. In these circumstances, the questions presented on appeal are:

1. Does R.C.W. 82.32.220, in contravention of Section 1 of the Fourteenth Amendment of the Federal Constitution, deprive appellant of equal protection of the laws by excluding securities held in trust for former general creditors of a debtor from the classification of "bona fide interests of third persons" as to which classification, which includes other security interests, subsequent state tax liens are subordinated?
2. Is a state's power to establish priority of its tax liens as against antecedent security interests of third persons limited by Section 1 of the Fourteenth Amendment to the Federal Consitution so as to require that any statutory classifications made for purposes of subordination of the tax liens be made on reasonable grounds?
3. If the answer to question No. 2 is in the affirmative, what is the proper test as to classifications of security interests of third persons by the legislature for the purpose of subordination of state tax liens?

STATEMENT OF THE CASE

Appellee instituted this action for the purpose of establishing priority of two tax liens for excise taxes owed by

Hi-Lo Foods, Inc., warrants for those liens having been filed (R. 0038 and 0033), over the antecedent mortgage lien of appellant, which arose under a mortgage executed in 1956 by the predecessors of Hi-Lo Foods, Inc. (R. 0041). Appellee asserted priority of its tax liens under R.C.W. 82.32.220 (Appendix B), which contains the proviso excluding securities held in trust for former general creditors from the classification of "bona fide interests of third persons," as to which antecedent interests the tax liens are subordinated.

In paragraph "IV" of its answer and counter-claim (R. 0006), appellant alleged the unconstitutionality of that proviso of R.C.W. 82.32.220. Issue was joined on the constitutional question by paragraph "I" of appellee's reply and answer (R. 0012). The case was submitted for decision by the trial court on the pleadings, on oral, open court stipulation of the parties (R. 0022-0026) and written briefs of counsel. The court entered its Conclusions of Law "II" (R. 0018):

> "That the above quoted proviso of R.C.W. 82.32.220 is discriminatory and unconstitutional as to the defendant Tacoma Association of Credit Men, a corporation, in that it denies said corporation equal protection of the laws, denies said corporation due process of law, and grants special privileges and immunities to others within the same class of persons as the Tacoma Association of Credit Men, a corporation."

and granted judgment for appellant.

Appellee then appealed the trial court's decision to the Washington Supreme Court, assigning as error (R. 0053, page 13 thereof) the trial court's conclusion that

the proviso of R.C.W. 82.32.220 was unconstitutional; the remaining assignments of error were ancillary thereto.

The only issue before the Washington Supreme Court was the constitutionality of that proviso; in its written opinion, that court stated the issue before it to be (R. 0060):

> "Deemed unconstitutional by the trial court, the italicized proviso was held invalid, which presents the only question in this appeal. The trial court declared the proviso invalid under Art. 1, §12 of the Washington State Constitution:
>
> "'No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations.'
>
> "And U.S. Const. 14th Amendment, §1, the pertinent part of which reads:
>
> '. . . No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Washington Supreme Court upheld the constitutionality of that proviso on the alternative grounds: that no constitutional issue of reasonable classification exists where the state exercises its power to fix priorities of liens, which ground that court characterized as "the direct lien priority approach" (R. 0061); that the exclusion of securities held in trust for former general creditors from the category of "bona fide interests of third parties" was neither a discriminatory nor an unreasonable classification (R. 0064), as tested by applicable standard, which

that court held to be the same standard applicable to legislative classifications made for purposes of statutes imposing taxes (R. 0063).

A petition for rehearing (R. 0069) was denied (R. 0075), and the court's written opinion (R. 0056-0068) became the final judgment of the Washington Supreme Court on November 20, 1963 (R. 0076).

On February 17, 1964, appellant filed, in the Washington Supreme Court, its notice of Appeal to the Supreme Court of the United States (R. 0077).

THE QUESTIONS ARE SUBSTANTIAL

The Washington Supreme Court's decision is based on two alternative grounds: That the power of the state to fix priority of its tax liens is not limited by the Fourteenth Amendment of the Federal Constitution; that the proviso of R.C.W. 82.32.220 does not contain unreasonable or arbitrary classification, even though that distinction is based solely upon the fact that a security is held in trust. Under the first ground of the decision, a citizen would have no protection under the Fourteenth Amendment from arbitrary, capricious and discriminatory classifications, for tax lien priority purposes, as to interest of third persons. That ground is one of first impression in this court, at least in the setting of tax lien priorities. This court has held that the equal protection clause of the Fourteenth Amendment protects an individual from state action which selects him for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. *Hillsborough v. Cromwell*, 326 U.S. 620, 66 S. Ct. 425, 90 L. Ed. 358 (1946). The taxing power of the state being thus

limited, the power of the state to fix priority of its tax liens must also be subject to some limitation under the Fourteenth Amendment. On this basis, the decision of the Washington Supreme Court should either be summarily reversed by this court, or the question should be given plenary consideration, with full briefs on oral arguments.

The second ground of the Washington Supreme Court's decision—that the classification was not arbitrary or discriminatory — presents the question of whether a state legislature, without violating the Fourteenth Amendment equal protection clause, can exclude from a statutory class a security which would be within that class but for the fact that it is held by a trustee. Securities held by general creditors directly are not excluded by R.C.W. 82.32.220 from the class of third party interests to which subsequent tax liens are subordinated, nor are securities which were given for any pre-existing indebtedness; thus, the classification contained in the proviso of R.C.W. 82.32.220 turns simply upon the trust character or status of the holder of the security. The question thus presented, in the setting of tax lien priorities as to interest of third persons, is of the same substance and importance, and is in fact governed by this court's decision of similar questions presented in the setting of statutes directly imposing taxes: *Morey v. Doud*, 354 U.S. 457, 77 S. Ct. 1344, 1 L. Ed.(2d) 1485 and *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 48 S. Ct. 553, 72 L. Ed. 927 (1928). In the latter cases the court gave plenary consideration to the question of statutes imposing taxes and granting exemptions therefrom where the tax or exemption turned on the character of the owner; the statutes were there

held to be repugnant to the Fourteenth Amendment as discriminating between persons in the same class.

CONCLUSION

This court has jurisdiction to review the decision of the Washington Supreme Court by appeal pursuant to 28 U.S.C.A. §1257 (2). The federal question was a principal issue decided by the Washington Supreme Court, that question is substantial, and should be decided by this court.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, *Appellant*, HI-LO FOODS, INC., a Washington corporation; TACOMA ASSOCIATION OF CREDIT MEN, a Washington corporation, and JACK FROST COMPANY, INC., a Washington corporation, *Respondents*.	No. 36230 EN BANC Filed July 18, 1963

The trial court held a tax lien priority statute to be discriminatory and, therefore, unconstitutional. The state appeals.

Hi-Lo Foods, Inc., a corporation operating a general grocery store in Tacoma, Washington, took steps to placate its creditors and avert insolvency proceedings by giving a mortgage for the security and benefit of its creditors. This mortgage, executed May 18, 1956, and delivered to the Tacoma Association of Credit Men, Inc., as mortgagee and trustee, was for the benefit of all of Hi-Lo's creditors otherwise unsecured as of that date.

By its terms, the mortgage intended to cover and encumber everything that the grocery company owned: Shifting stock of merchandise, after-acquired property, fixtures, appliances and vehicles—in short, all personal property then owned or which Hi-Lo Foods might in the future acquire.

The mortgage instrument authorized Hi-Lo Foods to continue business under certain conditions, among which were:

(1) Power was vested in the mortgagee, Tacoma Association of Credit Men, to select the manager, auditor, bookkeeper, clerks or cashier at its option;

(2) In case of default in the mortgage payments, the association was empowered to supervise and control the business in any manner it deemed best to secure the claims of the creditors for whose benefit the mortgage was given;

(3) Power was vested in the mortgagee, Tacoma Association of Credit Men, to assume possession of the business and property in case of abandonment, default, insecurity or if the mortgagors permitted any taxes to become delinquent.

Thus it was that the debtor, Hi-Lo Foods, Inc., was permitted, by its creditors, to continue in the grocery business under what the parties have designated as a mortgage trust agreement. The Tacoma Association of Credit Men, as mortgagee, was permitted to apply any payments made by Hi-Lo Foods on the mortgage, first to the costs of setting up and administering the trust, including attorneys' fees, and thereafter to distribute the residue to the creditors for whose benefit the mortgage trust agreement had been set up.

Hi-Lo Foods continued in the grocery business at the same location under this mortgage of May 18, 1956. In the course of its business operations following that date, it incurred liabilities for unpaid business and occupation taxes and retail sales taxes for the period of September

through December, 1958, in the amount of $6,526.11. Warrants for the collection of these taxes were issued by the State Tax Commission (R.C.W. 82.32.210) and filed by the sheriff of Pierce County with the clerk of court on January 12, 1959, and February 10, 1959. A warrant so filed constitutes a judgment against the tax debtor under R.C.W. 82.32.220—the very section of the tax statutes in issue here.

Hi-Lo Foods continued to operate its grocery store under the mortgage trust arrangement until March 29, 1959, when, hopelessly insolvent, it closed its doors and tendered possession of its business premises and stock of merchandise to the mortgagee, Tacoma Association of Credit Men, Inc. The trial court found that the trust mortgage was in default with a balance due of $19,274.79.

A receiver was appointed to conserve the assets and wind up the affairs of the debtor company. All parties agreed that the value of the assets on liquidation would be insufficient to pay off both the tax liens and the trust mortgage. Tacoma Association of Credit Men, as mortgagee and trustee for the otherwise unsecured creditors, Hi-Lo Foods, as mortgagor concurring, claims priority of its claims over the tax liens under R.C.W. 82.32.220, and the State of Washington claims priority of its tax liens under a proviso to be discriminatory, a denial of due process of law and equal protection of the laws to the Tacoma Association of Credit Men, Inc., and a grant of special immunities and privileges to others than, but within the same class as, the association. Accordingly, it ruled the proviso to be unconstitutional and adjudged the mortgage lien superior and prior to the lien of the

state for excise taxes. From this judgment the state appeals.

R.C.W. 82.32.210 empowers the State Tax Commission to issue warrants for the collection of unpaid taxes. Such warrants direct the sheriff to levy upon the real and personal property of the tax debtor. That the warrants, when pursuant to the statute are filed by the sheriff with the clerk of the superior court, shall constitute judgments is clear from both the statute and our decision construing it. *Weitz v. Electrovation Inc.*, 48 Wn.(2d) 604, 295 P.(2d) 728.

Pertinent parts of R.C.W. 82.32.220 read:

> "The sheriff shall file with the clerk of the superior court of his county a copy of the warrant, and thereupon the clerk shall enter [it] in . . . and thereupon the amount of such warrant so docketed shall become a specific lien upon all goods, wares, merchandise, fixtures, equipment, or other personal property used in the conduct of the business of the taxpayer against whom such warrant is issued, including property owned by third persons who have a beneficial interest, direct or indirect, in the operation of the business, and no sale or transfer of such personal property shall in any way affect such lien. The lien shall not be superior, however, to bona fide interests of third persons which had vested prior to the filing of the warrant when such third persons do not have a beneficial interest, direct or indirect, in the operation of the business, other than the securing of the payment of a debt or the receiving of a regular rental on equipment: *Provided, however, That the phrase 'bona fide interests of third persons' shall not include any mortgage of real or personal property or any other credit transaction that results in the mortgagee or the holder of the security acting as trustee for unsecured creditors of the taxpayer mentioned in the warrant who executed such chattel or real prop-*

> *erty mortgage or the document evidencing such credit transaction.* The amount of such warrant so docketed shall thereupon also become a lien upon the title to and interest in all other real and personal property of the taxpayer against whom it is issued the same as a judgment in a civil case duly docketed in the office of such clerk . . ." (Italics ours)

Deemed unconstitutional by the trial court, the italicized proviso was held invalid, which presents the only question in this appeal. The trial court declared the proviso invalid under Art. 1, § 12 of the Washington State Constitution:

> "No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations."

and U. S. Const. Fourteenth Amendment, § 1, the pertinent part of which reads:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Our first approach takes us to the Act itself, which simply declares, by explicit language, that the state, in its undoubted power to fix priority in liens and representing, as it does, all of the people of the state, has permitted secured creditors having no interest in the operation of the business, other than their own security, to come first and ahead of subsequently incurred tax liabilities. Then, in the exercise of this same power, on behalf of all of the people of the state, it asserts that unsecured creditors who

raise their security to a higher plateau on a going business cannot elevate their lien above that of the state for taxes either withheld from the state, or incurred in the subsequent operation of the business.

The proviso is designed to prevent the very thing here sought to be done by the unsecured creditors of Hi-Lo; its language could hardly be more appropriate to the occasion. Strike out the provisor, and the state's property, retail sales taxes collected by Hi-Lo, will be distributed to creditors secured under the trust mortgage. This in itself involves constitutional doctrines not yet injected into the case, and we do not bring them in by invitation.

Taking the direct lien priority approach, we avoid the problems of classification and simply assess the state's undoubted power to fix priority in liens as is done in other areas, and assume that this power quite logically can be said to extend to the state itself to declare its tax liens superior to all liens incurred in the operation or conduct of a business or occupation without regard to the element of time as was done in *Roeblings Sons Co. v. Frederickson Logging & Timber Co.*, 153 Wash. 580, 280 Pac. 93. Problems of constitutional limitations were studiously avoided in that case where premiums for industrial insurance incurred in the operation of a business were declared superior to chattel mortgages earlier made and established as liens. Constitutional provisions invoked in the instant case were neither asserted nor discussed in that decision, but the state's right to payment of industrial insurance premiums was adjudged superior and prior to the earlier executed chattel mortgages. Support for this decision is found in 51 Am. Jur., Taxation § 1016:

> "It is doubtless competent for the legislature not only to make taxes a lien upon all the property of the owner of the property taxed, but to make such liens a first lien upon the property of the taxpayer, giving them priority over a mortgage or any other lien existing against the property, whether created before or after the assessment of the tax; in most jurisdictions statutes giving such priority to tax liens have been enacted . . ."

See *Scandinavian American Bank v. King Co.*, 92 Wash. 650, 159 Pac. 786; *Carstens & Earles v. Seattle*, 84 Wash. 88, 146 Pac. 381.

That the parties to this action see in it a constitutional problem separate and apart from that of the state power to establish priority in liens is clear from the findings of fact and conclusions of law entered by the learned trial judge, and this requires a second and different approach to the case, that of classification. Despite the broad conceptual aspects of constitutional limitations or powers in revenue matters, tax problems of this sort usually reduce to the ultimate matter of classification, for this is a tax problem. The proviso involved here is a part of a revenue act, and we hold that laws prescribing the mode and means of collecting taxes and their civil enforcement are integral to those sections which levy the tax and are governed by the same constitutional standards as are held to control the very taxing power itself.

Aside from the war powers, nowhere is the power of government less inhibited than in its authority to tax. Where the legislature must create classifications to exercise the taxing power of the state, that one class may be favored over another does not make it necessarily discriminatory or arbitrary. The test is whether the legis-

lature has selected reasonable grounds upon which to distinguish the favored class from the disfavored class. *State Board of Tax Commissioners of Indiana v. Jackson*, 283 U. S. 527, 75 L. Ed. 1248, 51 S. Ct. 540. We have expressed this view many times before and since our decision in *Texas Co. v. Cohn*, 8 Wn.(2d) 360, 112 P.(2d) 522. If the need to classify is deemed inherent to a solution in this case as the parties to it presuppose, we see that the sorting process affects two classes of creditors: (1) Creditor having vested interests prior in time to the filing of the state liens (warrants) and having no direct or indirect interest in the operation of the business, and (2) unsecured creditors who have attained secured status through the merging of their claims in a mortgage contract that depends upon the continued operation of the business by the debtor in trust for the benefit of his unsecured creditors. We think that the line separating the two classes, though narrow, is sharply defined.

Consideration of both fairness and effectiveness in collecting the taxes levied by this statute motivated the state's policy in this proviso—the policy being that existing unsecured creditors shall not, by virtue of their contracts with their debtors, either defeat the state in the exercise of its taxing power on behalf of all its citizens or siphon off any part of such taxes received by the debtor in the course of business into the debtor's assets to be made available for ultimate distribution to the unsecured creditors.

Considered in the light of the state's paramount power to levy and collect taxes on behalf of all of its people and the undoubted power to make classifications based

upon narrow distinctions in the exercise of the taxing power, we think the act of classifying here was neither discriminatory nor unreasonable.

The proviso under attack here does not go to the point marked as the farthest distance one must go to reach the limits of legislative power short of transcending all reason. To uphold the proviso, we need not reach the far distant boundaries fixed by *Cruen v. State Tax Commission*, 35 Wn.(2d) 1, 211 P.(2d) 651.

Nor would we depart from the reasoning of *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 25 P(2d) 91, where we said:

> "'A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.' *Brown-Forman Co. v. Kentucky*, 217 U. S. 563."

That distinctions in tax matters may be extremely narrow is acknowledged in *Magnano Co. v. Hamilton*, 292 U. S. 40, 78 L. Ed. 1109, 54 S. Ct. 599, where the appellant attacked a statute of the State of Washington that levied a tax of fifteen cents per pound on all butter substitutes sold within the state, no tax being imposed thereon if the butter substitute were sold for exportation to any other state, territory or country. Concededly, this was a very high tax per pound when viewed in the light of economic conditions prevailing in 1933. The tax endangered the very business of manufacturing and selling butter substi-

tutes, and it was urged that it violated the fourteenth amendment as a tax designed not to raise revenue for the operation of government but to destroy a competitive or disfavored business.

In sustaining the tax, the supreme court said:

> ". . . If the tax imposed had been five cents instead of fifteen cents per pound, no one, probably, would have thought of challenging its constitutionality or of suggesting that under the guise of imposing a tax another and different power had in fact been exercised. If a contrary conclusion were reached in the present case, it could rest upon nothing more than the single premise that the amount of the tax is so excessive that it will bring about the destruction of appellant's business, a premise which, standing alone, this court heretofore has uniformly rejected as furnishing no juridicial ground for striking down a taxing act. . . ."

And, further:

> "From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment . . ."

Especially fine distinctions were upheld in a field other than taxation when an Oklahoma statute regulating the sale of eye glasses and frames was sustained in *Williamson v. Lee Optical Co.*, 348 U. S. 483, 99 L. Ed. 563, 75 S. Ct. 461.

Finally, we advert to a thoroughly documented decision of the supreme court, reversing a three-judge court of first instance, to sustain the constitutionality of the Alabama Unemployment Compensation Act. In *Carmichael*

v. *Southern Coal & Coke Co.*, 301 U. S. 495, 81 L. Ed. 1245, 57 S. Ct. 868, the Alabama statute required contributions from employers to support the unemployment trust fund of the United States. Excluded from this tax were numerous occupations, such as agriculture, domestic service, railway employees covered by the Railway Labor Act, insurance agents and employees of religious, charitable and scientific organizations and employers of less than eight persons.

Attacks were leveled at the Act as an infringement of both the due process and equal protection clauses of the fourteenth amendment. The court held this to be a taxing measure, regardless of its designation as a payroll contribution and asserted it to be in exercise of the state's taxing power. Many of the very points raised by the instant appeal were covered. The court said at page 509:

> ". . . It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation (citing cases). This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation (Citing cases).
>
> " . . . A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scurtiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it (Citing cases)."

And, on the question as to whether the exclusion of employers of less than eight employees was discriminatory and unreasonable, it was said (page 501):

". . . Yet, this is the type of distinction which the law is often called upon to make. It is only a difference in numbers which marks the moment when day ends and night begins, when the disabilities of infancy terminate and the status of legal competency is assumed. . . .

"Administrative convenience and expense in the collection or measurement of the tax are alone a sufficient justification for the difference between the treatment of small incomes or small taxpayers and that meted out to others. . . .

• • •

". . . Where the public interest is served one business may be left untaxed and another taxed, in order to promote the one . . .

". . . Relatively great expense and inconvenience of collection may justify the exemption from taxation of domestic employers, farmers and family businesses not likely to maintain adequate employment records . . ."

A clear, sharp line marks the difference in the case at bar between creditors having a prior recorded mortgage of lien upon a specific object and creditors having a general lien upon a shifting stock of goods, payment of which depends upon the continued operation of a business. Creditors who must look to the continued operation of a business, the carrying on of which requires the collection of tax moneys for the state and the incurring of further tax liability, occupy a status so markedly different from that of chattel mortgagees that the reasonableness of such classification is apparent.

The unsecured creditors, having elected to protect their interests by permitting their debtor to continue in business where tax liabilities would be incurred, entered a

class covered by the proviso, where the state's liens for taxes come ahead of their own.

We hold that the proviso is a constitutional exercise of the state's taxing power. Accordingly, the judgment is reversed with instructions to grant the state's liens priority.

HALE, J.

WE CONCUR:

OTT, C. J.
HILL J.
DONWORTH, J.
FINLEY, J.
WEAVER, J.
ROSELLINI, J.
HUNTER, J.
HAMILTON, J.

APPENDIX B

Statutes Involved

82.32.220 Execution of warrant — Lien — Satisfaction. The sheriff shall file with the clerk of the superior court of his county a copy of the warrant, and thereupon the clerk shall enter in the judgment docket, the name of the taxpayer mentioned in the warrant and in appropriate columns the amount of the tax or portion thereof and any increases and penalties for which the warrant is issued and the date when such copy is filed, and thereupon the amount of such warrant so docketed shall become a specific lien upon all goods, wares, merchandise, fixtures, equipment, or other personal property used in the conduct of the business of the taxpa against whom such warrant is issued, including property owned by third persons who have a beneficial interest, direct or indirect, in the operation of the business, and no sale or transfer of such personal property shall in any way affect such lien. The lien shall not be superior, however, to bona fide interests of third persons which had vested prior to the filing of the warrant when such third persons do not have a beneficial interest, direct or indirect, in the operation of the business, other than the securing of the payment of a debt or the receiving of a regular rental on equipment; *Provided, however,* That the phrase "bona fide interests of third persons" shall not include any mortgage of real or personal property or any other credit transaction that results in the mortgagee or the holder of the security acting as trustee for unsecured creditors of the taxpayer mentioned in the warrant who executed such chattel or real property mortgage or the

document evidencing such credit transaction. The amount of such warrant so docketed shall thereupon also become a lien upon the title to and interest in all other real and personal property of the taxpayer against whom it is issued the same as a judgment in a civil case duly docketed in the office of such clerk, and the sheriff shall thereupon proceed upon the same in all respects and with like effect as prescribed by law with respect to execution or other process issued against rights or property upon judgments of the superior court. Such warrants so docketed shall be sufficient to support the issuance of writs of garnishment in favor of the state in the manner provided by law in the case of judgments wholly or partially unsatisfied.

The sheriff shall be entitled to fees as provided by law for his services in levying execution on a superior court judgment and the clerk shall be entitled to a filing fee as provided by law, which shall be added to the amount of the warrant.

The proceeds received from any sale shall be credited upon the amount due under the warrant and when the final amount due is received, together with interest, penalties, and costs, the judgment docket shall show the claim for taxes to be satisfied and the clerk of the court shall so note upon the docket. Any surplus received from any sale of property shall be paid to the taxpayer or to any lien holder entitled thereto. If the return on the warrant shows that the same has not been satisfied in full, the amount of the deficiency shall remain the same as a judgment against the taxpayer which may be collected in the same manner as the original amount of the warrant.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 995

THE STATE OF WASHINGTON, *Appellee*,

v.

HI-LO FOODS, INC., *a Washington Corporation*;

TACOMA ASSOCIATION OF CREDIT MEN, *a Washington Corporation*, *Appellant*,

and

JACK FROST COMPANY, INC., *a Washington Corporation*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS

JOHN J. O'CONNELL,
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INDEX

	Page
QUESTION PRESENTED	6
COUNTERSTATEMENT OF THE CASE	6
THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION	8
QUESTIONS 2 AND 3 POSED BY APPELLANT WERE NOT PROPERLY RAISED OR EXPRESSLY PASSED ON BY STATE COURT	9
CONCLUSION	11

TABLE OF CASES

Cissna v. Tennessee, 246 U.S. 289, 38 S. Ct. 306, 62 L. ed. 720 (1918)	10
Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co., 142 U.S. 254, 35 L. ed 1004 (1891)	10
A. Magnano Co. v. Hamilton, 292 U.S. 40, 54 S. Ct. 599, 78 L. ed. 1109 (1934)	9
Parker v. McLain, 237 U.S. 469, 35 S. Ct. 632, 59 L. ed. 1051 (1915)	9
Seaboard Air Line R. Co. v. Watson, 287 U.S. 86, 53 S. Ct. 32, 77 L. ed. 180 (1932)	9
State Bd. of Tax Commissioners of Indiana v. Jackson, 283 U.S. 527, 51 S. Ct. 540, 75 L. ed. 1248 (1931)	9
Utley v. St. Petersburg, 292 U.S. 106, 54 S. Ct. 593, 78 L. ed. 1155 (1934), rehearing denied 292 U.S. 604, 54 S. Ct. 712, 78 L. ed. 1466	9
Zucht v. King, 260 U.S. 174, 43 S. Ct. 24, 67 L. ed. 194 (1922)	9

REVISED CODE OF WASHINGTON

82.05.050	7
82.32.220	6, 7

FEDERAL CONSTITUTION

§ 1, Fourteenth Amendment	6, 10, 11

In the Supreme Court of the United States

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THE STATE OF WASHINGTON, *Appellee*,

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and

JACK FROST COMPANY, INC., *a Washington Corporation*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, the appellee respectfully moves that this court enter an order dismissing the appeal on the grounds that this case does not present a substantial federal question, and that the second and third questions sought to be reviewed were not properly raised or expressly passed on by the state court.

QUESTION PRESENTED

Does Revised Code of Washington 82.32.220 (Appendix B, Juris. St.) deprive appellant of equal protection of the law guaranteed by section 1 of the Fourteenth Amendment to the Federal Constitution because it makes the state's lien for business and occupation taxes and retail sales taxes superior to the antecedent lien of persons having a beneficial interest in the business incurring the taxes, while the state's lien is subordinate to prior liens of persons having no beneficial interest in such business?

The foregoing is the only possible question presented by this appeal. Appellant has over simplified question one. Questions two and three posed by appellant were not raised in the state court and were not expressly passed on by that court.

COUNTERSTATEMENT OF THE CASE

Hi-Lo Foods, Inc., a corporation, was operating a grocery store business. Through its predecessors, on May 18, 1956, it gave to the appellant as mortgagee and trustee for previously unsecured creditors, its mortgage on all property owned by it or to be thereafter acquired. Included was all after acquired property, shifting stocks of merchandise and all fixtures and equipment.

The mortgage permitted Hi-Lo Foods to continue in business with all payments received thereunder being first applied to the costs of administering

the trust, including ten per cent to the trustee, with the balance distributed to the creditors for whose benefit the mortgage was executed.

Among the conditions contained in the mortgage were the following: (Appendix A, Juris. St.)

1. The mortgagee had the right to select, at its option, the manager, auditor, bookkeeper, clerk or cashier of the mortgagor.

2. In case of default in the mortgage payments, abandonment of the business by the mortgagor, the mortgagee feeling insecure, or the mortgagor permitting any taxes to become delinquent, the mortgagor could take possession.

Hi-Lo Foods continued in business until it became hopelessly insolvent. During this period of operation and subsequent to the date of the mortgage Hi-Lo Foods incurred liability to the appellee for unpaid business and occupation taxes and for failure to remit retail sales taxes collected from customers and held in trust by Hi-Lo Foods for appellee under RCW 82.05.050.

The appellee instituted this action in the Superior Court of the State of Washington for Pierce County for the appointment of a receiver and to enforce its lien under RCW 82.32.220. Not only the first proviso of that statute is important. Particular consideration should be given to the entire statute with emphasis on the proviso and the sentence preceding it. (Juris. St. 3).

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

The Supreme Court of Washington based its decision upon the reasonableness of classifying creditors in appellant's position from other types of creditors (Appendix A, Juris. St.) for purposes of determining the status of the state's tax lien.

In its opinion the Washington court stated:

> "A clear, sharp line marks the difference in the case at bar between creditors having a prior recorded mortgage or lien upon a specific object and creditors having a general lien upon a shifting stock of goods, payment of which depends upon the continued operation of a business. Creditors who must look to the continued operation of a business, the carrying on of which requires the collection of tax moneys for the state and the incurring of further tax liability, occupy a status so markedly different from that of chattel mortgagees that the reasonableness of such classification is apparent."

The state court's decision was based upon the obvious differences between creditors who have a lien but depend upon the operation of a business for payment in full of their claims and creditors who have no interest in the business other than a lien upon specific property. The basis of difference was not, as appellant contends, upon the use of a trustee as security holder for previously unsecured creditors on the one hand and security directly to the creditors on the other without the use of a trustee. A federal question which rests upon an obviously false assump-

tion is so plainly devoid of merit as to afford no basis for the exercise of this court's appellate jurisdiction over a state court. *Parker v. McLain*, 237 U. S. 469, 35 S. Ct. 632, 59 L. ed. 1051 (1915).

Beyond any legitimate controversy, the true mark of difference which is the basis of the classification in this case does not deprive appellant of equal protection of the law under the many decisions of this court setting forth the tests for reasonableness of classification in tax cases. *State Bd. of Tax Commissioners of Indiana v. Jackson*, 283 U.S. 527, 51 S. Ct. 540, 75 L. ed. 1248 (1931); *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 54 S. Ct. 599, 78 L. ed. 1109 (1934).

No substantial federal question forming a basis for review of a decision of a state court is presented by a contention of invasion of a constitutional right, where the question has been settled by previous decisions of this court. *Zucht v. King*, 260 U.S. 174, 43 S. Ct. 24, 67 L. ed. 194 (1922); *Seaboard Air Line R. Co. v. Watson*, 287 U.S. 86, 53 S. Ct. 32, 77 L. ed. 180 (1932); *Utley v. St. Petersburg*, 292 U.S. 106, 54 S. Ct. 593, 78 L. ed. 1155 (1934), rehearing denied 292 U.S. 604, 54 S. Ct. 712, 78 L. ed. 1466.

QUESTIONS 2 AND 3 POSED BY APPELLANT WERE NOT PROPERLY RAISED OR EXPRESSLY PASSED ON BY STATE COURT

The only question presented in the state court was whether the state statute in question discriminated against appellant and those in its class so as

to be a deprivation of equal protection under the Fourteenth Amendment to the Federal Constitution. The question of whether a state has the power to fix priority of its tax liens without being limited by the Fourteenth Amendment was not argued. Nor was such question expressly decided by the state court. (Appendix A, Juris. St.).

Any adjudication of the second and third questions posed by appellant was not necessary to the disposition of this case by the state court and any determination of them would have been superfluous. The answer to the first question completely decided the case. This court will therefore not review these questions. *Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co.*, 142 U.S. 254, 35 L. ed. 1004 (1891); *Cissna v. Tennessee*, 246 U.S. 289, 38 S. Ct. 306, 62 L. ed. 720 (1918).

CONCLUSION

On the basis of the unanimous decision of the state court and prior opinions of this court on classification under Amendment Fourteen, no substantial federal question requiring further argument or one of any public importance is involved. A review of questions two and three is unwarranted because not properly raised in the courts below, they were not decided and decision thereon would have been superfluous.

This appeal should be dismissed.

Respectfully submitted,

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